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Speaking in Support of Governor's Bill 6355

Introduction

Members of the committee, thank you for allowing me to speak today. My name is Sparky Abraham and I am speaking in support of Governor's Bill 6355. I am a second year student at Yale Law School, and a law student intern in the Mortgage Foreclosure Litigation Clinic. The clinic represents homeowners facing foreclosure, including Ms. Kenneally who is also testifying today. We strongly support Governor's Bill 6355.

Connecticut has been a national leader in developing court-annexed mediation as a response to the national foreclosure crisis. We have represented clients in every stage of the foreclosure process. We have attended mediation sessions with clients, and some of our clients have come from referrals by the mediators themselves. Though the mediation program has saved thousands of homes in Connecticut from foreclosure, the mediation process as it exists now can be long and painful. We have seen first hand the financial and emotional harm it can cause to homeowners.

My purpose in testifying today is to focus on the legal challenges that homeowners and their representatives face in trying to ensure an efficient and successful mediation program, and to talk about how Governor's Bill 6355 will help.

Mediating in Good Faith

Both parties to any foreclosure are already required to mediate in "good faith."¹ Unfortunately this requirement is diluted by two types of uncertainty. First, "good faith" has not been defined in the foreclosure mediation context. And, second, the remedies available to homeowners when servicers violate the "good faith" requirement are so far undefined. Lawmakers need to provide more content to this requirement in order to ensure that servicers participate effectively in mediation.

For homeowners, there is a self-enforcing standard. If you don't appear in person, if you don't come ready to make a deal, if you don't bring the required documentation, then the mediation will be terminated and the foreclosure will move forward. Simply put, you will lose your home. Nobody wants to endure that trauma.

There is no similar impetus encouraging servicers to take the mediation process seriously. Though the plaintiffs in foreclosure actions are typically loan servicers, these servicers don't normally own the mortgage or debt. They simply collect fees for handling homeowners' payments and dealing with defaults. Therefore, servicers

¹ *Uniform Foreclosure Mediation Standing Order A*

don't even have the direct incentive to fashion a modification that the owner of the debt would have, because, unlike the owner of the debt, the servicer will not be directly harmed by foreclosing on a severely under water home. Where the owner of the debt might derive an economic benefit from a modification, the servicers' only direct incentives are the fees they receive. And these fee incentives don't necessarily favor modification over foreclosure.

So, if mediation fails, servicers will simply foreclose. The borrower's home is just an item on a spreadsheet. Without a definition for "good faith," servicers have an incentive to just race to the bottom. Servicers are only incentivized to dedicate the bare minimum resources to the mediation. This can mean not sending representatives with settlement authority, or not even having such a representative available on the phone during mediation. This can also mean losing homeowners' financial documents, or failing to act on the documents provided until they become "stale." The result is that homeowners are faced with months of frustration and uncertainty, and often don't end up with a modification even when they can afford one. Due to the lack of definitions and lack of clarity in available remedies, homeowners and their attorneys are dissuaded from moving for sanctions, and courts are hesitant to approve them.

What Good Faith Means Now

The absence of a clear definition for "good faith" in the foreclosure context is exacerbated by the fact that "good faith" has too narrow of a definition in other contexts. For example, in breach of contract actions, a breach of the duty of good faith has required showing that the breaching party acted in "bad faith." Connecticut courts have held that "bad faith" involves a "dishonest purpose" or an "interested or sinister motive."²

The problem with this definition in the foreclosure mediation context is that servicers' failures in mediation often aren't "dishonest," "interested," or "sinister." Rather, they simply lack the incentives to take the process seriously, and so dedicate few resources and little attention to making mediation effective. The results of this systemic negligence are mediation periods that extend far beyond three sessions, a steady stream of different servicer representatives in each mediation period, and a process that is wasteful for all parties involved, including the courts.

How the Homeowner Protection Rights Bill Will Help

Governor's Bill 6355 will help remedy this situation. The bill defines good faith in terms of those practices that tend to make the mediation process more efficient and effective for all parties involved. Also, the bill defines failure to mediate in good faith in terms of the practices that tend to clog, frustrate, and delay the mediation

² *Liberty Bank v. New London Ltd. P'ship*, CV064005236, 2006 WL 2556207 (Conn. Super. Ct. Aug. 7, 2006) (Quoting *Hudson United Bank v. Cinnamon Ridge Corp*, 81 Conn.App. 557, 576-577 (Conn. App. Ct. 2004)).

process most. Servicers and their representatives will have a clear indication of what is expected of them, and homeowners and their representatives will have clear standards to point to when alleging that servicers have failed to mediate in good faith. Finally, parties, their representatives, and the courts will all have a clear idea of what remedies are available when a party fails to meet its mediation obligations, and so will be able to adjust their behavior accordingly.

By authorizing mediators to deem homeowners' financial document submissions "reasonably complete," the bill will prevent borrowers from being asked to submit the same documentation over and over again due to the documents being lost or going "stale." By requiring that the court become involved after the third mediation session, the bill will actually conserve judicial resources that might otherwise be wasted in protracted and unsuccessful mediation.

Conclusion

As a free legal clinic serving homeowners in need in the state of Connecticut, our primary concern is making sure that homeowners who can afford a modification are able to stay in their homes. Too often, troubled homeowners who can afford a modification are bogged down in the mediation process, incurring fees that could have been avoided. We believe that by making the mediation process more effective and efficient, Governor's Bill 6355 will help homeowners avoid these catastrophic outcomes. We also believe that the bill will ultimately benefit mortgagees and servicers by clarifying what the mediation process requires and making the process less prone to burdensome delays. Finally, we believe that this bill will benefit the courts by helping cases move more quickly through the mediation process and on to universally beneficial solutions.

Thank you for your time, and for allowing me to comment on this important issue.

